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Tan Boon Thien & Anor v Tan Poh Lee & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2540–12 OF 2018
MARY LIM, HAS ZANAH MEHAT AND VAZEER ALAM JJCA
30 OCTOBER 2019

C *Civil Procedure — Contempt of court — Breach of court order — Whether service on alleged contemnor of notice to show cause under O 52 r 2B of Rules of Court 2012 ('the ROC') was mandatory before ex parte application for leave to commence committal proceedings could be made — Whether fact that alleged contemnor had been served with the ex parte leave order and all cause papers* D *used in the obtaining of that order obviated the requirement for r 2B — Whether failure to comply with r 2B was not curable under O 1A or O 2 of the ROC — Whether prior consent of the attorney general ('AG') was not required before party to a civil proceeding initiated contempt proceedings against another party — Whether the cause papers in the contempt proceedings required to be served on* E *the AG*

The instant appeal, inter alia, concerned a question on which there was scant precedent, namely, whether service of a notice to show cause under O 52 r 2B of the Rules of Court 2012 ('the ROC') on an alleged contemnor was F mandatory before an ex parte application for leave to apply for an order of committal against him could be made. While O 52 r 2A(1) of the ROC provided that service of a formal notice to show cause was not necessary in the case of contempt committed in the face of the court, r 2B required that in all other cases of contempt of court, a formal notice to show cause why the alleged G contemnor should not be committed to prison or fined shall be served on him personally. In the instant case, the first respondent ('R1') had obtained leave of court ('the leave order') under O 52 r 3 of the ROC to commence committal proceedings against the first appellant ('A1') for allegedly breaching an order of the Court of Appeal ('COA') staying the proceedings between the parties in the H High Court pending the disposal of an appeal. R1 had alleged that the breach had also interfered with the due administration of justice. In applying to set aside the leave order, A1 argued that: (a) R1's failure to serve him with the O 52 r 2B show cause notice had deprived him of the right to defend himself before the formal contempt proceedings were launched; and (b) since it was I alleged that he had interfered with the due administration of justice, R1 should have obtained the consent of the attorney general ('AG') before commencing the contempt proceedings and should have served all the cause papers on the AG. A1 argued that there had to be strict adherence to the procedural rules governing committal proceedings because his liberty was at stake. On the other

hand, R1 submitted that the requirement in O 52 r 2B was superfluous because all cause papers used in the ex parte leave application and a copy of the leave order were served personally on A1 in accordance with O 52 r 4(3) of the ROC — and that was a sufficient form of a notice to show cause as was held by the High Court in *Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & Ors* [2016] MLJU 696 ('Tang Hak Ju'). R1 argued that the service of the aforesaid documents gave A1 sufficient information to answer the charge against him and it was not necessary to again serve A1 with the r 2B show cause notice, more so when r 2B did not provide for the form of the notice or the time period that had to be given thereunder.

Held, leave order set aside:

(1) The ex parte application for leave to issue contempt proceedings against A1 was not made in a proper manner. As such, the leave order was invalid and had to be set aside (see para 40).

(2) The word used in O 52 r 2B was 'shall'. Rule 2B required mandatory compliance and failure to comply would render the subsequent proceedings invalid. The Rules Committee in its wisdom had enacted r 2B for the purpose of giving the proposed contemnor the first opportunity of answering to the show cause notice before any application for leave to commence committal proceedings was made. The leave application could only be made after the time period given under the show cause notice had expired and it was only if there was no reply or no satisfactory explanation to the notice that any ensuing action was to be taken. Since contempt proceedings were criminal in nature involving the liberty of the proposed contemnor, any ambiguity or uncertainty had to be resolved in favour of the alleged contemnor. Hence, r 2B had to be read in favour of the proposed contemnor. This court disagreed with the view taken by the High Court in *Tang Hak Ju* and preferred the view and approach taken in *IOI Pelita Plantation Sdn Bhd v Lah Anyue Ngau & Ors* [2015] 9 MLJ 278 (see paras 31 & 34).

(3) The failure to comply with O 52 r 2B was not curable under O 1A and O 2 of the ROC (see para 35).

(4) There was no requirement under Malaysian law for contempt proceedings initiated by parties in civil proceedings to have the prior consent of the AG. A breach of a court order was a civil contempt. A criminal contempt was where the public prosecutor initiated the action or where the contempt was in the face of the court, and it was in that sense that the conduct in question interfered with the due administration of justice. In civil contempt, its exercise was largely to compel the contemnor to perform what was stipulated in a court order, often for the benefit of the applicant. On the other hand, the overriding purpose of criminal contempt was more to uphold and vindicate the authority of the

court whereby the action might be initiated by the AG. It would be unreasonable, if not impractical, if all contempt proceedings initiated by parties in civil proceedings required the involvement of the AG (see paras 37–39)

[Bahasa Malaysia summary

Rayuan semasa, antara lain, berkaitan dengan persoalan di mana terdapat duluan tidak mencukupi, iaitu, sama ada penyampaian notis untuk menunjukkan sebab di bawah A 52 k 2B Kaedah-Kaedah Mahkamah 2012 ('KKM') atas penghina adalah mandatori sebelum permohonan ex parte untuk kebenaran untuk memohon perintah pengkomitan terhadapnya boleh dibuat. Meskipun A 52 k 2A(1) KKM memperuntukkan bahawa penyampaian notis rasmi untuk menunjukkan sebab tidak diperlukan dalam kes penghinaan yang dilakukan di hadapan mahkamah, k 2B menetapkan agar dalam kesemua kes penghinaan mahkamah yang lain, notis rasmi untuk menunjukkan sebab kenapa penghina tidak seharusnya dihukum penjara atau didenda akan disampaikan kepadanya secara peribadi. Dalam kes semasa, responden pertama ('R1') telah mendapat kebenaran mahkamah ('perintah kebenaran') di bawah A 52 k 3 dari KKM untuk memulakan prosiding pengkomitan terhadap perayu pertama ('A1') kerana didakwa telah melanggar perintah Mahkamah Rayuan ('MR') menggantung perbicaraan antara pihak-pihak di Mahkamah Tinggi sementara menunggu pelupusan rayuan. R1 telah mendakwa bahawa pelanggaran tersebut juga mengganggu pentadbiran keadilan yang sewajarnya. Dalam permohonan untuk mengetepikan perintah kebenaran, A1 berpendapat bahawa: (a) kegagalan R1 untuk menyampaikan notis untuk menunjukkan sebab A 52 k 2B kepada beliau telah menghalang haknya untuk membela diri sebelum prosiding pengkomitan secara formal dimulakan; dan (b) oleh kerana ianya didakwa bahawa beliau telah mengganggu pentadbiran keadilan yang sewajarnya, R1 seharusnya mendapat persetujuan daripada Peguam Negara ('PN') sebelum memulakan prosiding pengkomitan dan seharusnya telah menyampaikan kesemua kertas kausa kepada PN. A1 berpendapat bahawa ianya harus mempunyai pematuhan tegas kepada peraturan prosedur yang menetapkan prosiding pengkomitan kerana hak asasinya akan diputuskan. Sebaliknya, R1 berpendapat bahawa pra-syarat dalam A 52 k 2B adalah berlebihan kerana kesemua kertas kausa yang digunakan dalam permohonan kebenaran ex parte dan salinan perintah kebenaran telah disampaikan secara peribadi kepada A1 bersesuaian dengan A 52 k 4(3) KKM — dan ianya adalah suatu bentuk notis yang mencukupi untuk menunjukkan sebab seperti yang diputuskan oleh Mahkamah Tinggi di *Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & Ors* [2016] MLJU 696 ('Tang Hak Ju'). R1 berpendapat bahawa penyampaian dokumen tersebut telah memberikan maklumat yang mencukupi kepada A1 untuk menjawab dakwaan terhadapnya dan tidak ada keperluan lagi untuk menyampaikan kepada A1 dengan notis tunjuk sebab k 2B, lebih-lebih lagi apabila k 2B tidak memberikan bentuk notis atau jangka masa yang harus diberikan.

Diputuskan, perintah kebenaran diketepikan:

(1) Permohonan ex parte untuk kebenaran bagi memulakan prosiding pengkomitan terhadap A1 tidak dibuat dengan teratur. Oleh itu, perintah kebenaran adalah tidak sah dan harus diketepikan (lihat perenggan 40).

(2) Perkataan yang digunakan dalam A 52 k 2B adalah 'hendaklah'. Kaedah 2B memerlukan pematuhan mandatori dan kegagalan untuk mematuhinya akan menjadikan prosiding seterusnya adalah tidak sah. Jawatankuasa Kaedah dalam kebijaksanaan mereka telah menggubal k 2B dengan tujuan memberikan penghina peluang pertama untuk menjawab notis menunjukkan sebab sebelum sebarang permohonan kebenaran untuk memulakan prosiding pengkomitan dapat dibuat. Permohonan kebenaran hanya dapat dibuat setelah jangka masa yang diberikan di bawah notis menunjukkan sebab telah berakhir dan hanya sekiranya tidak ada balasan atau tidak ada penjelasan yang memuaskan kepada notis tersebut bahawa tindakan selanjutnya akan diambil. Oleh kerana prosiding penghinaan bersifat jenayah yang melibatkan hak kebebasan asasi penghina yang didakwa, maka sebarang ketidakjelasan atau ketidakpastian harus diselesaikan bagi memihak kepada penghina yang didakwa. Oleh itu, k 2B harus dibaca berpihak kepada penghina yang didakwa. Mahkamah ini tidak bersetuju dengan pandangan yang diambil oleh Mahkamah Tinggi dalam *Tang Hak Ju* dan lebih memihak kepada pandangan dan pendekatan yang diambil dalam *IOI Pelita Plantation Sdn Bhd lwn Any Anyue Ngau & Ors* [2015] 9 MLJ 278 (lihat perenggan 31 & 34).

(3) Kegagalan untuk mematuhi A 52 k 2B tidak dapat diperbetulkan di bawah A 1A dan A 2 KKM (lihat perenggan 35).

(4) Tidak ada pra-syarat di bawah undang-undang Malaysia untuk prosiding pengkomitan yang dimulakan oleh pihak-pihak dalam prosiding sivil untuk mendapatkan persetujuan terdahulu dari JPN. Pelanggaran perintah mahkamah adalah penghinaan sivil. Penghinaan jenayah adalah di mana pendakwa raya memulakan tindakan atau di mana penghinaan itu adalah di hadapan mahkamah, dan dalam errti bahawa tingkah laku yang berkaitan mengganggu pentadbiran keadilan yang sewajarnya. Dalam penghinaan sivil, pelaksanaannya adalah sebahagian besarnya untuk memaksa penghina untuk melaksanakan apa yang telah ditetapkan dalam perintah mahkamah, sering kali demi kepentingan pemohon. Sebaliknya, tujuan utama penghinaan jenayah adalah untuk menegakkan dan membenarkan kekuasaan mahkamah di mana tindakan tersebut harus dimulakan oleh JPN. Adalah tidak wajar, sekiranya tidak praktikal, jika kesemua prosiding pengkomitan yang dimulakan oleh pihak-pihak dalam proses sivil memerlukan penglibatan JPN (lihat perenggan 37–39)]

Cases referred to

Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193; [1986] 2 CLJ 109; [1986] CLJ Rep 58, SC (refd)

Attorney General v Times Newspaper Ltd [1974] AC 273, HL (refd)

Aurol Anthony Sabastian v Sembcorp Marine Ltd [2013] 2 SLR 246, CA (refd)

Azman bin Jufri v Medtronic Australasia Pty Ltd [2015] 6 MLJ 841; [2015] 5 CLJ 1026, CA (refd)

Chandra Sri Ram v Murray Hiebert [1997] 3 MLJ 240; [1997] 3 CLJ Supp 518, HC (refd)

Code Brilliant Sdn Bhd (in liquidation) & Ors v Heng Ji Keng & Ors [2013] 9 MLJ 212; [2014] 6 CLJ 502, HC (refd)

Helen Yeap Poh Sim & Yang Lain lwn Universal Trustee (Malaysia) Bhd [2001] 7 CLJ 414, HC (refd)

IOI Pelita Plantation Sdn Bhd v Lah Anyie Ngau & Ors [2015] 9 MLJ 278; [2014] 1 LNS 1300, HC (folld)

Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor [1996] 5 MLJ 637; [1997] 1 CLJ Supp 158, HC (refd)

Karam Singh Veriah v Karpal Singh [1988] 2 MLJ 603; [1987] 1 CLJ 63; [1987] CLJ Rep 680 (refd)

Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v Md Jaafar bin Abdul Carrim & Anor [1998] 2 MLJ 244; [1998] 1 CLJ Supp 454, HC (refd)

Nicholls v Nicholls [1997] 147 NLJ 61 (refd)

Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601; [1994] 2 CLJ 705, SC (refd)

Syarikat M Mohamed v Mahindapal Singh & Ors [1991] 2 MLJ 112; [1991] 1 CLJ 582; [1991] 4 CLJ Rep 16, HC (refd)

TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151; [1977] 1 LNS 126, FC (refd)

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)

Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang [2013] 5 MLJ 541; [2013] 1 CLJ 1060, CA (refd)

Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & Ors [2016] MLJU 696; [2017] 2 CLJ 345, HC (not folld)

Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal [1995] 3 MLJ 549; [1995] 4 CLJ 427, SC (refd)

ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd [2014] 10 MLJ 633; [2014] 4 CLJ 895, HC (refd)

Legislation referred to

Administration of Justice (Protection) Act 2016 [SG] ss 3(1)(e), 30

Arbitration Act 2005 s 10

Bankruptcy Rules 1969 r 18(1)

Companies Act 1965 s 260
Contempt of Court Act 1981 [UK] s 7
Courts of Judicature Act 1964 ss 13, 16
Criminal Procedure Code s 376
Federal Constitution arts 126, 145(3)
Probate and Administration Act 1959 s 19
Rules of Court 2012 O 1A, O 2, O 49, O 50 r 2(2), O 52, O 52 rr 2, 2A, 2B, 3, 4, 4(3)

Vijaya Segaran (Nicole Wee, Norazali Nordin and Ling Li Ching with him) (Chooi & Company + Cheang & Ariff) for the appellant.
Michael Chow (Sunita Sankey, Wendy Yeong and Surachetth Jostsuwan with him) (Liza Khan & Sankey) for the first respondent.
Ng Thiang Tuan (Keith Kwan, Chia Poh Yee and Tan Sin Yee with him) (Tuan, Mohd Zain & Co) for the second and third respondents.

Has Zanah Mehat JCA (delivering judgment of the court):

INTRODUCTION

[1] This is the first appellant's application to set aside the ex parte order dated 25 July 2019 ('encl 71') granting leave to the first respondent to commence committal proceedings against the first appellant ('leave order') and consequently, that the notice of motion dated 27 July 2019 ('encl 70') filed by the first respondent for an order for committal against the first appellant be struck out.

[2] The relevant cause papers are as follows:

(a) encl 71 — ex parte order for leave for committal order dated 25 July 2019 ('leave order');

(b) encl 70 — notice of motion dated 29 July 2019 for an order for committal;

(c) encl 81 — notice of motion dated 6 August 2019 to set aside the ex parte order ('leave order');

(d) encl 61 — notice of motion and statement pursuant to O 52 r 3 of the Rules of Court 2012 dated 16 July 2019 ('the statement');

(e) encl 62 — first respondent's affidavit verifying/in support affirmed on 16 July 2019 ('the first respondent's affidavit (1)');

(f) encl 66 — first respondent's further affidavit affirmed on 23 July 2019 ('the first respondent's affidavit (2)');

(g) encl 82 — first appellant's affidavit affirmed on 6 August 2019 in opposing encl 70 and supporting encl 81 ('the first appellant's affidavit (1)'); and

(h) encl 88 — first respondent's affidavit in reply affirmed on 9 August 2019 ('the first respondent's affidavit (3)').

[3] We heard submissions on encl 81 on 20 August 2019 and we adjourned for our deliberation and decision.

BACKGROUND FACTS

[4] The first appellant, first, second and third respondents are siblings and the lawful children of Tan Kim Choon (the deceased). The second appellant is the wife of the first appellant.

[5] Numerous disputes arose between the appellants and the respondents revolving around the deceased's estate. Various actions were filed at the High Court. One of them is Suit No WA-22NCVC-703–10 of 2018 which was filed at the Kuala Lumpur High Court ('KL probate action').

[6] Pending the determination of the KL probate action, the first respondent filed encl 6, primarily pursuant to s 19 of the Probate and Administration Act 1959 for an order to appoint an administrator *pendente lite* to administer the deceased's estate pending the determination of the KL probate action. The High Court allowed the first respondent's application on 7 December 2018 ('the High Court order').

[7] Dissatisfied with the High Court order, the first and second appellants filed an appeal to the Court of Appeal.

[8] The first and second appellants filed applications for stay of the High Court order but the applications were dismissed by the High Court.

[9] Both appellants on 4 January 2019 and 7 January 2019, filed applications in encls 10 and 18 respectively for stay of the High Court order or alternatively for an order that the status quo of the KL probate action to be maintained pending the disposal of the appellants' appeal. On 12 January 2019, the second and third respondents (the third and fourth defendant in the High Court) filed application in encl 25 to intervene in the proceedings.

[10] All three applications were fixed and heard together before this court on 21 February 2019. There were no objections to encl 25 and we allowed the

application with costs to follow the event. As for encls 10 and 18, an order for the interim preservation of assets as listed in Schedules A and B of encl 11 (the affidavit filed in support of encl 10) was allowed pending the disposal of the appeal ('stay order'). The order for an interim preservation of assets in the stay order reads as follows:

> kesemua hartanah dan aset yang disenaraikan dalam Jadual A dan B (seperti dilampirkan) dipelihara sementara, di mana tiada pelupusan, pemindahan ataupun penyerahan hak aset-aset tersebut dibenarkan sementara menunggu pelupusan akhir rayuan ini *[All properties and assets listed in Schedules A and B (as annexed) be interim preserved, whereby no disposition, transfer or assignment whatsoever of the assets are allowed pending the outcome of this Appeal]*.

[11] On 10 May 2019, the first appellant filed a suit in Singapore against HSBC Trustees International Ltd ('HSBC') who was holding trust monies in the accounts specified in item (k) of Schedule B ('the trust account'). The relief sought by the first appellant in that suit is a declaration that the trust has terminated ('the Singapore HSBC suit'). On 13 May 2019, the first appellant filed an ex parte injunction in the same Singapore HSBC suit. One of the prayers sought by the first appellant in that application is:

> ... that the following sum of RM6 million is disbursed from Account No 8212–3153–5800–01 and/or such other account of the trust Accounts (as defined in the Affidavit of Tan Boon Tien affirmed on 7 May 2019 and filed in support therein) ...

[12] The filing of the Singapore HSBC suit came to the knowledge of the first respondent. To the respondents, the filing of the Singapore HSBC suit and especially the prayer sought in the injunction application by the first appellant was a clear breach of the stay order and also an interference with the due administration of justice. The first respondent then filed an ex parte application in encl 61 for leave to issue contempt proceedings against the first appellant under O 52 r 2 of the Rules of Court 2012 ('the ROC 2012').

[13] On 25 July 2019, this court heard the application for leave ('encl 61'). On being satisfied that the first respondent had made out a prima facie case against the first appellant, this court granted leave to the first respondent ('the leave order').

[14] By encl 81, the first appellant applied to set aside the leave order.

THE FIRST APPELLANT'S CASE

[15] The first appellant filed only one affidavit in support of both his applications to set aside the leave order and to oppose the first respondent's application to commit him to prison. He relied on various grounds. However,

learned counsel for the first appellant in his submission, raised three procedural grounds. Learned counsel submitted that the leave order obtained by the first respondent was irregular and invalid as there were:

(a) no notice to show cause given to the first appellant under O 52 r 2B of the ROC 2012 prior to the filing of the leave application;

(b) no cause papers were served on the attorney general ('AG'); and

(c) no consent was sought from the AG to commence committal proceedings against the first appellant.

[16] Learned counsel argued that by not giving the notice to show cause to the first appellant before the filing of the application for leave, the first appellant has been deprived of his right to defend himself right from the beginning. Hence, based on these grounds alone, the leave order granted on 26 July 2019 should be set aside and consequently encl 81 should be allowed and encl 70 should be dismissed.

THE FIRST RESPONDENT'S CASE

[17] Learned counsel for the first respondent on the other hand replied that there is full compliance with all the procedural requirements in procuring leave from this court pursuant to O 52 r 3 of the ROC 2012. In this regard, learned counsel contended that there was no requirement that the leave application must be preceded by a show cause notice that has to be personally served on the first appellant.

PROCEDURAL ISSUES

[18] Based on the submissions, the procedural issues for our consideration are:

(a) whether the service of notice to show cause under O 52 r 2B on the proposed contemnor is mandatory before any ex parte application for leave under O 52 r 3 can be properly made;

(b) whether the AG's consent is required in contempt proceeding initiated by a party in a civil proceedings; and

(c) whether the cause papers shall be served on the AG in the proceedings undertaken under para (b) above.

OUR DECISION

Whether a formal notice to show cause under O 52 r 2B is mandatory

[19] In view of there being no case precedents showed to us that were either

decided by this court or the Federal Court on the effect of r 2B as raised by learned counsel for the first appellant, we are of the considered view that this issue merits our full consideration before we proceed to consider other grounds raised by the first appellant in his affidavit in support. If we agree with the first appellant's counsel submission, it may not be necessary at this stage for this court to consider encl 70 on merit.

[20] The enabling provisions in our law on the power to initiate any contempt proceedings is enshrined in art 126 of the Federal Constitution and is similarly provided under s 13 of the Courts of Judicature Act 1964. Both art 126 and s 13 read as follows:

Article 126 Power to punish for contempt

The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

s 13 Contempt

The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[21] On the procedural requirements to commence a contempt proceedings, it is apt for us to reproduce O 52 of the ROC 2012 which provides as follows:

52 Committal

1 ...

2 *Committal for contempt of Court (O 52 r 2)*

The Court may, on the application of any party to any cause or matter or on its own motion, make an order of committal in Form 107.

2A Contempt committed in the face of the Court (O 52 r 2A)

(1) If a contempt is committed in the face of the Court, it shall not be necessary to serve a formal notice to show cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the Court shall make a proper record of the proceedings.

(2) Where a Judge is satisfied that a contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.

(3) Where such person has purged his contempt by tendering his unreserved apology to the Court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.

(4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him.

2B Other cases of contempt (O 52 r 2B)

In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.

3 Application to Court (O 52 r 3)

(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

4 Application for order after leave to apply granted (O 52 r 4)

(1) When *leave has been granted* under rule 3 to apply for an order of committal, *the application for the order must be made by notice of application to the Court*, and, unless the Court granting leave has otherwise directed, *there must be at least eight clear days between the service of the notice of application and the day named therein for the hearing*.

(2) Unless *within fourteen days after such leave* was granted the notice of application is filed, the leave shall lapse.

(3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, *must be served personally* on the person sought to be committed.

(4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service of the notice under this rule if it or he thinks it just to do so. (Emphasis added.)

[22] It is clear that based on O 52, there are two different sets of procedure to commence contempt proceedings depending on the nature or category of contempt in issue: r 2A is where the act of contempt is in the face of the court; and r 2B which deals with other forms of contempt. The case before us falls under the second category.

[23] As a matter of history, rr 2A and 2B were inserted to O 52 of the RHC 1980 on 21 September 2000 vide PU(A) 342/2000 as a result of amendments introduced by the Rules Committee established under s 16 of the Courts of Judicature Act 1964. The same amended rules were adopted in our present ROC 2012. Similar provisions are not found in Singapore or India (*Malaysian Civil Procedure 2015* (Vol 1) at p 689).

[24] The first appellant's counsel submitted that the philosophy behind the introduction of r 2B appears to be that the proposed contemnor should be

given an opportunity to explain himself to the putative applicant well before proceedings are launched. If the explanation is unacceptable, the court may be moved and the explanation or the lack of it placed before the court. It appears that this rule is intended to provide additional protection to the alleged contemnor. Counsel further submitted that based on the decided cases, it was held that procedural rules governing committal proceedings must be strictly adhered to as the liberty of the individual is at stake (*Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC; *Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang* [2013] 5 MLJ 541; [2013] 1 CLJ 1060).

[25] There was no dispute that all the cause papers filed under O 52 r 2 and the leave order were served on the first appellant. It was served on 2 August 2019 to the first appellant personally by the first respondent's solicitors at the first appellant's solicitor's office (para 6 of encl 88). However, learned counsel for the first respondent admitted that no notice to show cause as envisaged under r 2B was served. In any case, learned counsel submitted that the service of all documents under O 52 r 3 as required to be served under O 52 r 4 is to be regarded as sufficient form of the notice to show cause. Hence, the notice to show cause as required under r 2B is no longer necessary. The service of the cause papers and the leave order personally on the proposed contemnor are already sufficient safeguards and information for the contemnor to answer the charge against him. Further, there was no provision in relation to the manner, time limit and form to be used in the show cause procedure under r 2B that are required to be adhered to. A stringent procedure is already provided for under O 52 r 3 and r 4. Therefore, r 2B is actually superfluous.

[26] We are mindful of the earlier decided cases before the amendment of the RHC 1980 that, the putative applicant was considered as having met all the threshold requirements for leave if:

(a) all the cause papers required under O 52 r 2 have been complied with — see *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v Md Jaafar bin Abdul Carrim & Anor* [1998] 2 MLJ 244; [1998] 1 CLJ Supp 454 (HC);

(b) the application was made in the court where the contempt was allegedly committed — see *Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor* [1996] 5 MLJ 637; [1997] 1 CLJ Supp 158; and *Karam Singh Veriah v Karpal Singh* [1988] 2 MLJ 603; [1987] 1 CLJ 63; [1987] CLJ Rep 680;

(c) the grounds for which leave sought were particularised in the statement and verified by the affidavit — see *Helen Yeap Poh Sim & Yang Lain lwn Universal Trustee (Malaysia) Bhd* [2001] 7 CLJ 414; and

(d) the statement in support of the notice of motion was filed contained sufficient information as to what the alleged breach was, for the contemnor to know what the alleged contempt was against him and to enable him to meet the charge and prepare the defence — see *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112; [1991] 1 CLJ 582; [1991] 4 CLJ Rep 16; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193; [1986] 2 CLJ 109; [1986] CLJ Rep 58.

[27] In the case of *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151; [1977] 1 LNS 126, the Federal Court ruled that in the matter of contempt arising out of disobedience to an injunction, the test is to ask whether the proposed contemnor knows of it. It need not be necessary that he should be served. The former Supreme Court in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal* [1994] 2 MLJ 601; [1994] 2 CLJ 705 ruled that service of the relevant court order was not essential, for all that is required is for the proposed contemnor to have notice of the order said to have been breached.

[28] In *Nicholls v Nicholls* [1997] 147 NLJ 61, Lord Woolf MR expressed that if there is non-compliance with the procedural requirements which does not prejudice the proposed contemnor, setting aside the order purely on the grounds of technicality is contrary to the interest of justice. This was followed in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240; [1997] 3 CLJ Supp 518. The Supreme Court in *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193; [1986] 2 CLJ 109; [1986] CLJ Rep 58 had earlier expressed similar views, making a distinction between non-observance of rules and mere technical irregularity.

[29] We noted that the above cases were decided before the amendment to O 52 RHC 1980 where rr 2A and 2B were introduced (now adopted by the ROC 2012). The decision quoted to us by the first respondent's counsel which was directly on point based on O 53 r 2B of the ROC 2012 is the High Court case of *Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & Ors* [2016] MLJU 696; [2017] 2 CLJ 345, where Lim Chong Fong JC (as he then was) as stated in the para [45] of His Lordship's judgment held, inter alia, that the notice to show cause referred to in O 52 r 2B meant the documents referred to in O 52 r 4(3). To further support the first respondent's position, learned counsel referred us to the meaning or definition of the term 'notice to show cause' in *Mitra's Legal & Commercial Dictionary* (quoting from *Black's Law Dictionary* (8th Ed)). As an analogy, counsel also referred to other provisions of the former RHC 1980 and the ROC 2012 pertaining to the provisions to show cause. Counsel referred to O 49 in respect of garnishee proceedings and

O 50 r 2(2) in respect of charging orders. Based on these observations, counsel submitted that the decision of *Tang Hak Ju* is the correct proposition of law even after r 2B was inserted in the ROC 2012 as opposed to the decision in *IOI Pelita Plantation Sdn Bhd v Lah Anyie Ngau & Ors* [2015] 9 MLJ 278; [2014] 1 LNS 1300.

[30] With respect, both counsel did not address us on the effect of the clear wording of r 2B that is 'a formal notice to show cause why he should not be committed to the prison or fined shall be served personally'.

[31] It is trite law that the statutory provisions should be given effect to its plain meaning. The word used in r 2B is 'shall'. There are plethora of authorities on the meaning of the word 'shall'. Azizah Nawawi JC (now JCA) in *Code Brilliant Sdn Bhd (in liquidation) & Ors v Heng Ji Keng & Ors* [2013] 9 MLJ 212; [2014] 6 CLJ 502, when Her Ladyship had to deal with the issue on whether the notice to convene the creditors' meeting to all its creditors is mandatory under s 260 of the Companies Act 1965; Her Ladyship opined that the use of the word 'shall' in s 260 of the Act clearly imposes a mandatory statutory duty on the company to send the notice to all its creditors. In para [27] of the judgment, Her Ladyship stated the following:

> [27] The use of the word 'shall' in s 260 of the Act 125 clearly imposes a mandatory statutory duty on CBSB to send the notice to convene the creditors' meeting to all its creditors. Therefore, the failure to send the requisite notices had deprived SNA Consult of its statutory right to attend the creditors' meeting. The failure to issue the statutory notice under s 260 of Act 125 means that the creditors' meeting and all the resolutions passed during the meeting, including the appointment of the liquidators are a nullity.

[32] Mary Lim J (now JCA) in *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633; [2014] 4 CLJ 895, where Her Ladyship dealing with s 10 of the Arbitration Act 2005 stated that:

> [26] It will be appreciated that the language in sub-s 10(1) is couched in mandatory terms with the use of the word 'shall'. Where the terms of sub-s 10(1) are met, the court is obliged to stay court proceedings and refer the parties to arbitration ...

[33] In *Azman bin Jufri v Medtronic Australasia Pty Ltd* [2015] 6 MLJ 841; [2015] 5 CLJ 1026, this court in the judgment of Vernon Ong JCA (now FCJ) which concerned r 18(1) of the Bankruptcy Rules 1969 where the mode of application is expressly stipulated in the following terms:

> 18 Applications to be made by summons in chambers.
>
> (1) Except where these Rules or the Act otherwise provide, *every application to the Court shall*, unless the Chief Justice otherwise directs, *be made by summons in chambers supported by affidavit*. (Emphasis added.)

His Lordship opined that the order obtained by improper mode of proceedings was invalid. In *Azman Juffri*, the judgment creditor had applied for the substituted service of bankruptcy notice and creditor's petition by notice of application instead of way of a summons-in-chambers as provided under r 18. In para [38] of the judgment, His Lordship stated the following:

> [38] We now return to the arguments on the correct mode of application. Applying the authorities cited above, it is settled law that *the word 'shall' is mandatory* and *thereby imposes an obligation to comply with what is required to be done*. We do not consider that since r 110 of the BR 1969 is silent on the mode of application, the applications made by notices of application are correct and regular. There is a clear stipulation in r 18(1) of the BR 1969 making it mandatory for an application to be filed by summons in chambers. In the circumstances, the filing of a notice of application by the JC as opposed to a summons in chambers is a clear breach of a mandatory provision. The breach is not a mere irregularity or formal defect capable of being cured. The application is in a sense the originating process upon which the JC seeks to obtain an order for substituted service. As such the wrong mode adopted by the JC undermines the very stratum of the application for substituted service itself and consequently, any order obtained thereunder must be equally tainted and rendered null and void. (Emphasis added.)

[34] Based on the foregoing reasons, we are of the considered view that r 2B requires mandatory compliance and its failure will render the subsequent proceedings invalid. We are of the view that the Rules Committee in its wisdom enacted r 2B with the purpose that the proposed contemnor be given the first opportunity of answering to the notice to show cause before any application for leave is made. The leave application should be made only after the expiry of the period that the answer should be given and it is only when and where there is no reply or no satisfactory explanation given that any ensuing action is taken. Further, we say that as the result of contempt proceedings being criminal in nature involving the liberty of the proposed contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849 (FC)), any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1995] 3 MLJ 549; [1995] 4 CLJ 427). Thus, r 2B should be read in favour of the proposed contemnor. We therefore disagree with the High Court in *Tang Hak Ju* and prefer the view and approach in *IOI Pelita Plantation Sdn Bhd v Lah Anyue Ngau & Ors*.

[35] Based on the above reasons, we also opine that failure to comply with r 2B is not curable under O 1A and O 2 of the ROC 2012:

(a) whether the AG's consent is required in contempt proceedings initiated by a party in a civil proceedings; and

(b) whether the cause papers should be served on the AG.

[36] Learned counsel for the first appellant submitted that the consent of the AG should be sought in light of art 145(3) of the Federal Constitution and s 376 of the Criminal Procedure Code. The reason being that the present proceedings are also of a criminal contempt, as there is an allegation of an interference with the due administration of justice. Counsel submitted that the AG stands in a constitutional role of guardian of public interest as a public prosecutor and also plays the function of disinterested prosecutor. Therefore, while a private individual was entitled to constitute contempt proceedings for criminal contempt, such individual was obliged to first consult the AG before commencing proceeding under r 3 or at least, to notify the AG in writing, of the proposed proceedings. It is then up to the AG as to whether his office will participate in the proceedings. Learned counsel suggested that we should adopt similar approach taken by the courts in Singapore and the United Kingdom. Counsel submitted on the Singapore case of *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 and the United Kingdom case of *Attorney General v Times Newspaper Ltd* [1974] AC 273 at p 306. Hence, the leave order should be set aside as a matter of right as the papers were not served on and the consent of the AG was not sought.

[37] Counsel admitted that both Singapore and the United Kingdom have statutory provisions that require the consent of the AG. Section 30 read together with s 3(1)(e) of the Administration of Justice (Protection) Act 2016 of Singapore, and s 7 of the Contempt of Court Act 1981 of the United Kingdom, both provide for the mandatory consent of the AG before the institution of any contempt proceedings. We find that there is no equivalent provision under our law, that contempt proceedings initiated by the parties in civil proceedings require the prior consent of the AG. Therefore, we disagree with learned counsel on this point.

[38] A breach of a court order amounts to civil contempt. A criminal contempt is where the Public Prosecutor initiates the action or where the contempt is in the face of the court, and it is in that sense that the conduct in question interferes with the due administration of justice.

[39] In our view, in the case of civil contempt, its exercise is largely to compel the contemnor to perform what is stipulated in a court order, often for the benefit of the applicant. On the other hand, the overriding purpose of criminal contempt is more to uphold and vindicate the authority of the court whereby the action may be initiated by the AG. It will be unreasonable if not impractical, if all contempt proceedings initiated by the concerned parties in any civil proceedings require the involvement of the AG.

A CONCLUSION

[40] In view of the reasons we have set out in the foregoing analysis, we are constrained to hold that the ex parte application for leave to issue contempt proceedings against the first appellant was not made in a proper manner. As such, the leave order granted on 25 July 2019 is invalid and should be set aside. Consequently, we allow encl 81.

B

Leave order set aside.

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Reported by Ashok Kumar

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